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In The

Supreme Court of The United States

October Term, 1962

No. [redacted] 210

MACK B. THOMPSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In The

Supreme Court of The United States

October Term, 1962

No. 721

MACK B. THOMPSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA; IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina affirming the conviction of the petitioner is reported as STATE v. MACK B. THOMPSON, 256 N. C. 593, 124 SE 2d 728. The opinion also appears in Appendix of the petitioner's petition, page 12.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Does the decision of MAPP v. OHIO, 367 U. S. 643 (1961)

give to the petitioner any safeguards not given to him by North Carolina General Statutes sec. 15-27.1 (1957)?

Did the petitioner properly raise and preserve any Federal Constitutional question according to State procedure and practice, in the Trial Court and the Supreme Court of North Carolina?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petitioner attempts to bring his case within the provisions of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States. Statutory provisions involved include General Statutes of North Carolina, sections 18-13 and 15-27.1, set out in Appendix hereto, pages 6 and 7. Rule 28, Rules of Practice in the Supreme Court, 254 N. C. 783, 810, is set forth in the Appendix, page 7.

STATEMENT OF THE CASE

The petitioner was originally convicted at the March Criminal Term, 1961, of Alamance County Superior Court under a warrant charging him with illegal possession of intoxicating liquors for the purpose of sale in a place of business known as The Orange Bowl Supper Club. Upon appeal to the Supreme Court of North Carolina, although eleven assignments of error were set forth, including assignments relating to the trial court's rulings upon admission of evidence secured pursuant to a search warrant, the only assignment of error brought forward and discussed in petitioner's brief was that relating to the overruling of petitioner's motion for judgment as in case of nonsuit. The Supreme Court of North Carolina found no error in the trial. STATE v. MACK B. THOMPSON, 256 N. C. 593, 124 S.E. 2d 728. The facts disclosed by the record of the case on appeal are set forth in the report of the case, Appendix to Petition, p. 12.

Petitioner now seeks a writ of certiorari in the Supreme Court of the United States.

ARGUMENT

I THE PROVISIONS OF NORTH CAROLINA GENERAL STATUTES SECTION 15-27.1 (1957), EXCLUDING EVIDENCE OBTAINED UNDER AN ILLEGAL SEARCH WARRANT, ARE TO THE SAME EFFECTS AS THIS COURT'S DECISION IN MAPP v. OHIO, 367 U. S. 643 (1961), THEREFORE ANY PROTECTION OF PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS GIVEN UNDER THE LATTER DECISION WERE AFFORDED TO HIM BY STATE LAW AT THE TIME OF HIS TRIAL.

The decision in WOLF v. COLORADO, 338 U. S. 25 (1949), which was in effect at the time of petitioner's trial, held "that in a prosecution in a State court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." (p. 33) In overruling that holding, this Court, in MAPP v. OHIO, 367 U. S. 643 (1961), enunciated the principle: "All evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a State Court." (p. 655) The pertinent portion of North Carolina General Statutes section 15-27.1, enacted in 1957, is as follows:

> "No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action."

It is manifest that the terms "illegal" and "legal", as used in this section, connote compliance with the Fourth, Fifth, and Fourteenth Amendments to the Constitution. Thus, by mandate of State Statute, the trial court in which petitioner was convicted had determined the competency and admissibility of the evidence through inquiry as to the legality of the search warrant, including its legality under the Fourteenth Amendment. Although the Wolf decision had not been

overruled at the time of petitioner's trial, evidence which might otherwise have been admissible under its rule was made inadmissible by statute, and the later decision in MAPP v. OHIO granted to the petitioner no further protection than that which had been afforded him at his trial by said statute.

II THE PETITIONER DID NOT PROPERLY PRESENT ANY QUESTION AS TO THE DEPRIVATION OF CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT BEFORE THE TRIAL COURT OR BEFORE THE SUPREME COURT OF NORTH CAROLINA, AND THOSE COURTS DID NOT PASS UPON OR DETERMINE ANY FEDERAL CONSTITUTIONAL QUESTION.

Petitioner excepted to the ruling of the trial court as to the admissibility of evidence obtained under the search warrant, it is true, but the record discloses that he did not present the ruling for review upon appeal. Under Rule 28, Rules of Practice in the Supreme Court, 254 N. C. 783, 810, exceptions not set out in appellant's brief, or in support of which no argument is given or authority cited, are taken as abandoned by him.

The Supreme Court of North Carolina does not review constitutional questions unless they are properly raised and passed upon by the trial court (STATE v. JONES, 242 N. C. 563, 564, 89 S.E. 2d 129), and this practice is in conformity with decisions of the Supreme Court of the United States (EDELMAN v. CALIFORNIA, 344 U. S. 357, 358).

In PARKER v. MC LAIN, 237 U. S. 469, 59 L. Ed. 1051, on page 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

Petitioner brought forward and discussed in his brief on appeal only his exception to the overruling of his motion

for non-suit, thereby abandoning any other exceptions he may have made to the trial court's decisions. Not only has he failed to claim or set up any Federal right; he has failed to carry forward his exceptions to rulings based upon the state law which gives him, at the least, as great protection as does the decision in MAPP v. OHIO, supra.

CONCLUSION

It is respectfully submitted that the petitioner's obvious purpose is to reopen the case upon its merits, seeking a review of the trial court's decision that evidence obtained under the search warrant was admissible. Petitioner has not availed himself of his right to have this matter heard upon appeal to the Supreme Court of North Carolina, and he has presented nothing which tends to show a denial, by either the trial court or the Supreme Court of North Carolina, of any Federal right. The principle relied upon by petitioner, set forth in the MAPP v OHIO decision, is the same as that established by North Carolina General Statutes section 15-27.1, which was effective at the time of petitioner's trial and the hearing of his appeal before the Supreme Court of North Carolina.

Therefore, for the foregoing reasons, respondent State of North Carolina urges that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Counsel for the State of North Carolina,
Respondent

APPENDIX

Applicable State Statutes involved:

General Statutes of North Carolina, Chapter 18, Section 13:

"Search warrants; disposal of liquor, equipment and materials seized.—Upon the filing of a complaint under oath by a reputable citizen, or information furnished under oath by an officer charged with the execution of the law, before a justice of the peace, recorder, mayor, or other officer authorized by the law to issue warrants, that he has reason to believe that any person has in his possession, at a place or places specified, liquor for the purpose of sale, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, a warrant shall be issued commanding the officer to whom it is directed to search the place or places described in such complaint or information; and if such liquor, or equipment or materials designed or intended for use in the manufacture of intoxicating liquor, be found in any such place or places, to seize and take into his custody all such liquor, and to seize and take into his custody all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling or manufacturing intoxicating liquor which may be found at such place or places, and to keep the same subject to the order of the court. The complaint or information shall describe the place or places to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquor or other property alleged to be used in carrying on the business of selling or manufacturing intoxicating liquor as particularly as practicable, and any description, however general, that will enable the officer executing the warrant to identify the property seized shall be deemed sufficient. All liquor, and all equipment or materials designed or intended for use in the manufacture of intoxicating liquor, seized

under this section shall be held and shall upon the acquittal of the person so charged be returned to the established owner, and shall within ten days upon conviction or default of appearance of such person be destroyed: Provided that any tax-paid liquor so seized shall within ten days be turned over to the board of county commissioners, which shall within ninety days from the receipt thereof turn it over to hospitals for medicinal purposes or sell it to legalized alcoholic beverage control stores within the State of North Carolina, the proceeds of such sale being placed in the school fund of the county in which such seizure was made, or destroy it. (1923, c. 1, s. 12; C. S., s. 3411(1); 1939, c. 12; 1941, c. 310; 1957, c. 1235, s. 3.)"

General Statutes of North Carolina, Chapter 15, Section 27.1:

"Article applies to all search warrants; competency of evidence obtained by illegal search.—The provision of this article shall apply to search warrants issued for any purpose including those issued pursuant to the provisions of G. S. 18-13. No facts discovered or evidence obtained by reason of the issuance of an illegal search warrant or without a legal search warrant in the course of any search, made under conditions requiring a search warrant, shall be competent as evidence in the trial of any action. (1957, c. 496.)" (Emphasis ours)

Rule 28, Rules of Practice in the Supreme Court, 254 N. C. 783, 810:

"Appellant's Brief.

"The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions. As to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, proper-

ly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

"Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or typewritten copies to be mimeographed of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the third Tuesday preceding the call of the district to which the case belongs the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief." (Emphasis ours)